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NO. .....

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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1982

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MIGUEL FRANCO-GOMEZ,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I

Should petitioner be denied standing to assert the illegality of the search and seizure of his codefendant with whom he was convicted of aiding and abetting, and yet the codefendant achieved an acquittal?

### II

Were petitioner's Sixth Amendment rights violated by having to endure a trial, to his detriment, when his motion for severance should have been granted prior to trial?

### III

Was petitioner denied his right to a fair trial by having to stand trial with a codefendant, Horacio Raul Estrada, who was also a government agent and at the same time at the defense counsel table and privy to the extensive conferences among the various defendants and their counsel?

## PARTIES TO THE PROCEEDING

On October 15, 1980, MIGUEL FRANCO-GOMEZ, the petitioner herein, and four codefendants were indicted by the federal grand jury for the Southern District of California on five counts. The other defendants were: JESUS ANTONIO TRUJILLO-GARCIA, HORACIO RAUL ESTRADA, JORGE AYAD-BAYONA and MANUEL MERRIDA AGUIRRE.

MIGUEL FRANCO-GOMEZ was found guilty on Counts One, Two, Three and Four.

JESUS ANTONIO TRUJILLO-GARCIA was found guilty on Counts One, Four and Five, and his conviction was subsequently reversed by the United States Court of Appeals for the Ninth Circuit.

HORACIO RAUL ESTRADA pled guilty to Count Two.

MANUEL MERRIDA AGUIRRE was acquitted.

There are no other parties to this proceeding.

## TOPICAL INDEX


| | Page |
|---|---|
| Questions Presented | i |
| Parties to the Proceeding | ii |
| Topical Index | iii |
| Table of Authorities Cited | v |
| Petitioner prays for writ of certiorari | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statement of the Case | 2 |
| Constitutional Provisions Involved | 5 |
| Statement of Facts | 6 |
| Reasons for Granting the Writ | 10 |
| Argument | 11 |
| I Petitioner FRANCO should be accorded standing to assert the right to object to evidence which was the basis of his conviction on Counts One and Four of the indictment despite his lack of dominion and control over the questioned contraband at the time of the search and seizure or the claim of such | 11 |
| II Petitioner FRANCO's motion for severance of his trial from those of the other defendants should have been granted, and, by not doing so, the trial court violated petitioner's rights under the Sixth Amendment to the United States Constitution | 17 |

## TOPICAL INDEX

Argument (cont'd) Page

III The codefendant HORACIO RAUL ESTRADA sat at the defense counsel table and conferred extensively with his codefendants and their attorneys, thus placing himself in the heart of the defense camp during the trial while, unbeknownst to the defense, he was a government agent. This indisputably denied petitioner FRANCO his rights to effective counsel and a fair trial as guaranteed to him under the Sixth Amendment to the United States Constitution and violated the attorney-client privilege ..... 19

Conclusion ..... 21

Appendix "A" attached
Opinion of the Court of Appeals
for the Ninth Circuit filed August 16, 1982.

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Britt v. Superior Court (1962), 58 Cal. 2d 469 .. | 15 |
| Bruton v. United States (1968), 391 U.S. 123 .... | 18 |
| Caldwell v. United States, 205 F.2d 879 (App. D.C. 1953) ..... | 20, 21 |
| Coplon v. United States, 191 F.2d 749 (App. D.C. 1951) ..... | 21 |
| Goldman v. United States, 316 U.S. 129 ..... | 16 |
| Jones v. United States (1960), 362 U.S. 257 .... | 16 |
| Kaplan v. Superior Court (1971), 6 Cal. 3d 150, 98 Cal. Rptr. 649 ..... | 12 |
| Katz v. United States (1967), 389 U.S. 347 .... | 15 |
| People v. Edwards (1969), 71 Cal. 2d 1096 ..... | 15 |
| People v. Krivda (1971), 5 Cal. 3d 357 ..... | 15 |
| People v. Martin (1955), 45 Cal. 2d 755, 290 P.2d 855 ..... | 12 |
| Pointer v. Texas (1965), 380 U.S. 400 ..... | 18 |
| Rakas v. Illinois (1978), 439 U.S. 128 ..... | 16 |
| United States v. Chadwick (1977), 433 U.S. 1 .. | 15 |
| United States v. Salducci (1980), 448 U.S. 83 ..... | 16 |

## TABLE OF AUTHORITIES CITED


| United States Constitution | Page |
|---|---|
| Amendment IV | 5, 12, 17 |
| Amendment VI | i, 5, 11, 12, 17, 18, 19, 20 |

**Statutes**

| | |
|---|---|
| 18 U.S.C. 2 | 2 |
| 21 U.S.C. 841(a)(1) | 2, 3 |
| 21 U.S.C. 846 | 2 |
| 28 U.S.C. 1254(1) | 2, 5 |

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Petitioner, MIGUEL FRANCO-GOMEZ, respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed August 16, 1982.

## OPINIONS BELOW

The trial below was by the court. The decision of the Ninth Circuit Court of Appeals, affirming the judgment, is contained in Appendix "A" hereto.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATEMENT OF THE CASE

On October 15, 1980, the federal grand jury for the Southern District of California returned Criminal Indictment No. 81-0726, charging petitioner, MIGUEL FRANCO-GOMEZ, and four codefendants in the following five counts:

**Count One**: Conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

**Count Two**: Petitioner, MIGUEL FRANCO-GOMEZ, was charged with aiding and abetting codefendant HORACIO RAUL ESTRADA's possession with intent to distribute 27.6 grams of cocaine on October 3, 1980, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

**Count Three**: Petitioner was charged with possession with intent to distribute 1,533.0 grams of cocaine on October 3, 1980, in violation of 21 U.S.C. § 841(a)(1).

**Count Four**: Codefendant JESUS ANTONIO TRUJILLO-GARCIA was charged with possession with intent to distribute 470.8 grams of cocaine on October 3, 1980, in violation of 21 U.S.C. § 841(a)(1), and petitioner was charged with aiding and abetting him, in violation of 18 U.S.C. § 2.

**Count Five:** Codefendant JESUS ANTONIO TRUJILLO-GARCIA was charged with possession with intent to distribute 268.8 grams of heroin on October 3, 1980, in violation of 21 U.S.C. § 841(a)(1). [CR 25; SECR 12-33][1].

Codefendant JORGE AYAD-BAYONA pled guilty prior to trial.

On December 9, 1980, defendant JESUS ANTONIO TRUJILLO-GARCIA filed motions, *inter alia*, to suppress evidence and to have his case severed from that of codefendant HORACIO RAUL ESTRADA. [CR 25; SECR 12-33].

On December 12, 1980, the government filed its response. [CR 29; ECR 7-18].

On December 15, 1980, petitioner, MIGUEL FRANCO-GOMEZ, moved the court to permit him to join in the motions of JESUS ANTONIO TRUJILLO-GARCIA, and this motion was granted. [CR 31].

On March 3, 1981, a combined motion hearing and court trial was commenced before the Honorable Earl B. Gilliam, United States District Judge for the Southern District of California. Further evidence was presented on March 4th, 5th, 6th, 10th, 11th and 17th, 1981.

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[1]"CR" refers to the docket control number assigned by the district court clerk in the certificate of record before the Ninth Circuit Court of Appeals.

"ECR" refers to the appellant's Excerpts of the Clerk's Record before the Ninth Circuit Court of Appeals.

"SECR" refers to the appellee's supplemental Excerpts of the Clerk's Record before the Ninth Circuit Court of Appeals.

On March 18, 1981, after the denial of all motions by the trial court [RT 536, 601][2], and the filing of a stipulation of facts [RT 542; CR 46; ECR 25-35], petitioner, MIGUEL FRANCO-GOMEZ, was found guilty on all counts on which he had been charged. That is, petitioner was found guilty on Counts One, Two, Three and Four [RT 542]. Codefendant JESUS ANTONIO TRUJILLO-GARCIA was found guilty on Counts One, Four and Five [RT 624]. Codefendant MANUEL MERRIDA AGUIRRE was acquitted, and codefendant HORACIO RAUL ESTRADA pled guilty to Count Two of the indictment, as aggravated by an information alleging a prior federal felony narcotics conviction--increasing the maximum sentence to 30 years and a $50,000.00 fine [RT 544-545].

On May 18, 1981, codefendant JESUS ANTONIO TRUJILLO-GARCIA was sentenced to concurrent terms of 18 months in custody on Counts One, Four and Five, plus concurrent three-year special parole terms on Counts Four and Five. [CR 59; ECR 36].

On November 2, 1981, petitioner, MIGUEL FRANCO-GOMEZ, was sentenced to concurrent terms of two years in custody on Counts One, Two, Three and Four, plus concurrent three-year special parole terms on Counts Two, Three and Four. [CR 90; SECR 36]. The judgment in petitioner's case was entered on November 3, 1981, and petitioner timely filed notice of appeal on November 9, 1981. [CR 95; SECR 38].

On August 16, 1982, the Ninth Circuit Court of Appeals reversed the judgment as to codefendant JESUS ANTONIO

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[2]As used herein "RT" refers to the Reporter's Transcript.

TRUJILLO-GARCIA but affirmed the judgment as to the petitioner herein. (Appendix "A" attached.)

This petition is timely before this Court pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

**United States Constitution, Amendment IV:**

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation . . . . "

**United States Constitution, Amendment VI:**

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

## STATEMENT OF FACTS

On September 23, 1980, an investigation of HORACIO RAUL ESTRADA (hereinafter "ESTRADA") was initiated by Special Agent T. M. Whiteside of the San Diego District Office of the Drug Enforcement Administration ("D.E.A."). This investigation was initiated becasue a confidential informant informed the D.E.A. that ESTRADA was selling multi-pound quantities of cocaine in the San Diego, California area. ESTRADA had been working as a confidential informant for D.E.A. Agent Gorman for the last six years. [RT 418:3 - 419: 12; 113:10-16].

After considerable effort, the informant finally arranged for the purchase of one ounce of cocaine. On October 3, 1980, at approximately 12:40 p.m., the informant and ESTRADA met to discuss the transaction. At approximately 2:30 p.m., the informant told members of the D.E.A. surveillance team that ESTRADA expected a shipment of cocaine from Los Angeles, California to arrive momentarily.

Ten minutes later, ESTRADA introduced MIGUEL FRANCO-GOMEZ ("FRANCO") to the confidential informant at ESTRADA's place of business and advised him that FRANCO had transported cocaine from Los Angeles. Surveillance agents observed the informant, ESTRADA and FRANCO exit the business establishment and walk to a 1978 Jaguar parked in front.

FRANCO opened the trunk of the vehicle and removed a brown paper bag which he handed to ESTRADA. FRANCO left in the Jaguar. ESTRADA walked to a Dodge van, placed the brown bag inside the van and then departed followed by the confidential informant.

Surveillance had been set up in the parking lot area of a

7-11 store at Third and "E" Streets in Chula Vista where the informant was to purchase the cocaine. The informant drove to the 7-11 parking lot and told the agents that he had observed one and one-half kilos of cocaine in the trunk of the Jaguar and that ESTRADA had a pound of cocaine in the brown paper bag. ESTRADA was headed for an undisclosed location and in approximately ten minutes he would deliver to the informant an ounce of cocaine for $2,100.00. ESTRADA was followed by three agents to 415 "D" Street, Chula Vista, where he exited the vehicle carrying the brown paper bag. ESTRADA was observed to walk into an apartment complex at 415 "D" Street, Chula Vista. The agents could not determine which apartment he entered. [RT 69:5-8].

Approximately five to ten minutes later, at 3:00 p.m., the agents observed ESTRADA leave Apartment No. 8, talking momentarily at the door with an unidentified individual. [RT 70:7-24]. ESTRADA was carrying a small red package. He entered his van, drove directly to the 7-11 parking lot where he did sell one ounce of cocaine for $2,100.00.

At 3:10 p.m., the signal for the arrest of ESTRADA was given. [RT 330:12 - 331:23]. Agent Whiteside testified that after the arrest signal went out, ESTRADA walked inside the 7-11 and there was an unexpected delay before Agent Gorman arrived to make the arrest. [RT 333:17 - 336:18].

Agent Gorman testified, however, that the arrest took place at 3:10 p.m. – the time the arrest signal went out. [RT 120:15-18]. Agent Gorman testified that he talked with ESTRADA inside the 7-11 store for three to four minutes. [RT 126:12 -15]. Contrary to his police report

Agent Gorman testified at the hearing that he immediately advised ESTRADA of his *Miranda* rights and that ESTRADA stated that he had delivered a pound of cocaine to "TONIO BATTIA" at the apartment complex and that the pound remained inside the residence. ESTRADA also stated that "they were coming to the residence to check the sample." [RT 143: 1 - 144:12]. These statements were entered as justification for exigent circumstances–not for proof against "TONIO BATTIA"–later revealed to be JESUS ANTONIO TRUJILLO-GARCIA ("TRUJILLO-GARCIA"). [RT 142:17-19].

Agent Gorman testified that he remained at the 7-11 store for approximately five to seven minutes before leaving. [RT 127:8-10]. At that time, approximately 3:15 to 3:17 p.m., he broadcasted the contents of the conversation over the police radio. [RT 127:8-10; 146:19-25].

Although Agent Gorman testified that this radio broadcast was acknowledged, he admitted that he did not know who had acknowledged him or who had heard the broadcast. [RT 201:5-9]. No agent testified at the hearing that he had heard the broadcast.

Agent Howell and Agent Rafenstein had been maintaining surveillance of Apartment No. 8 at 415 "D" Street, Chula Vista. Agent Rafenstein testified that "prior" to 3:10 p.m., they were advised of ESTRADA's arrest. [RT 209: 25 - 210:7]. Agent Howell testified that at approximately 3:10 p.m., they entered Apartment No. 8 to "secure" the premises upon the instruction of Agent Barnes. [RT of 3/2/81 –20:9-23]. Agent Howell's police report also quotes 3:10 p.m. as the time of entry. [RT 73:5-8].

Neither Agent Howell nor agent Rafenstein indicated that they were aware of ESTRADA's post arrest statements. Agent Rafenstein testified that the premises were "secured"

for three reasons: (1) To ensure the safety of agents and bystanders; (2) to "continue the investigation"; and (3) to "observe the evidence." [RT 210:8-13].

Agent Howell testified that his primary concern was: (1) The possibility of destruction of evidence; and (2) the possibility of flight of the unidentified individual inside. [RT of 3/2/81 –25:7-9].

Agent Barnes did not testify.

Agents Rafenstein and Howell were met at the door by TRUJILLO-GARCIA, who was, at the time, still unidentified. [RT 70:25 - 71:5]. Without his consent or any warrants, the agents forced their way into the apartment. In the interest of "securing" the apartment, they made a thorough inspection of all the rooms on the premises. [RT 84:2-15].

An empty brown bag was discovered next to a scale in a bathroom and in the northwest bedroom (later admitted to be the bedroom of codefendant MANUEL MERRIDA AGUIRRE [RT 36:13-14]), a quantity of white powder in a pyrex dish was found sitting on the bed. [RT 4:18-19]. The agents then waited inside the apartment for the arrival of a search warrant–which, at that time, had not yet been initiated. [RT 4:23 - 5:1].

The entire elapsed time from ESTRADA's entering the complex until the agents' entry into Apartment No. 8 was only fifteen to twenty minutes. [RT 68:23-25]. Immediately after ESTRADA's arrest, petitioner FRANCO was arrested and taken into custody. [RT 342:18-20].

At approximately 3:30 p.m., a male–later identified as Guillermo Lopez Araiza–knocked on the door of the apartment. At approximately 3:50 p.m., Victor Saavedra Espinoza knocked on the door of the apartment and was

admitted. At approximately 4:15 p.m., Jose Sanchez knocked on the door and was admitted. Each of these individuals asked for "Tony." At approximately 6:05 p.m., the front door to the apartment was unlocked and a male who identified himself as MANUEL MERRIDA AGUIRRE admitted himself.

It was not until 7:30 p.m.–four hours and twenty minutes after the warrantless and non-consensual entry–that the agents were advised by Agent Gorman that a federal search warrant had been obtained. The warrant was based upon the affidavit of Agent Whiteside and contained information about what Agents Rafenstein and Howell had observed when they "secured" the residence. Agent Whiteside learned of the "securing" of the apartment prior to making the decision to obtain a search warrant for Apartment No. 8. [RT 347:7 - 349:14].

The search uncovered approximately one-half kilo of cocaine, four ounces of heroin, and items described as paraphernalia, scales, blender, etc. None of the items impounded were found in TRUJILLO-GARCIA's private bedroom except for a trace residue of cocaine found in his closet.

Evidence later obtained revealed that TRUJILLO-GARCIA was a co-renter of the apartment with AGUIRRE. Jose Sanchez was immediately deported to Mexico and his address was neither sought nor obtained.

## REASONS FOR GRANTING THE WRIT

**1. Petitioner FRANCO should be accorded standing to assert the right to object to evidence which was the basis of his conviction on Counts One and Four of the indictment despite his lack of dominion and control over the questioned**

contraband at the time of the search and seizure or the claim of such.

2. Petitioner FRANCO's motion for severance of his trial from those of the other defendants should have been granted, and, by not doing so, the trial court violated petitioner's rights under the Sixth Amendment to the United States Constitution.

3. The codefendant HORACIO RAUL ESTRADA sat at the defense counsel table and conferred extensively with his codefendants and their attorneys, thus placing himself in the heart of the defense camp during the trial while, unbeknownst to the defense, he was a government agent. This indisputably denied petitioner FRANCO his right to effective counsel and a fair trial as guaranteed to him under the Sixth Amendment to the United States Constitution and violated the attorney-client privilege.

## ARGUMENT

### I

### Petitioner FRANCO Should Be Accorded Standing To Assert The Right To Object To Evidence Which Was The Basis Of His Conviction On Counts One And Four Of The Indictment Despite His Lack Of Dominion And Control Over The Questioned Contraband At The Time Of The Search And Seizure Or The Claim Of Such.

In all candor, this argument addresses counsel's pet peeve, and is a subject upon which he has lectured across the country at great length. If this case were tried in a California state court, rather than a California federal court

(here the choice of forum was purely the government's election), petitioner FRANCO would have had bestowed upon him the right to assert the violation of the Search and Seizure guarantees of the Fourth Amendment to the United States Constitution–even though it was not *his* rights which were violated–as long as the evidence was utilized against *him* in the criminal proceeding. *Kaplan v. Superior Court* (1971), 6 Cal. 3d 150, 98 Cal. Rptr. 649; *People v. Martin* (1955), 45 Cal. 2d 755, 290 P.2d 855. The contention that such a rule is essential to keeping absurdity out of the law was presented at trial (RT 485-490) and on appeal. The Ninth Circuit Court of Appeals appropriately deferred to previous decisions of this Honorable Court and invited us to present our case here, which we do now (Appendix "A" p. 6, n. 1).

This argument will commence with a statement about what is nonsensical about the existing federal standing rules, both in theory and as applied, and then proceed to an analysis of how they got that way.

Initially, it must be noted that codefendant TRUJILLO-GARCIA, as well he should, had standing to object to the admissibility of the cocaine and heroin found in his apartment. The Ninth Circuit held the search and seizure illegal and reversed his case (Appendix "A" pp. 6 - 9). Also, codefendant AGUIRRE would have been accorded the same rights by virtue of his residence at the same location were it not for his acquittal. That is textbook law. The farce begins at this juncture.

Although petitioner FRANCO was convicted of Count Four, embracing his involvement with the activities in Apartment No. 8, with which he had no connection, his innocence in that regard renders him ineligible to contest

the legitimacy of the search. As conceded below by this counsel, that is the present state of the federal law. However, there are three violent objections to this tenet, which counsel openly invites anyone to analytically challenge.

The first is that those persons most culpable who have ownership of or possession of or a reasonable expectation of privacy in a domicile and are caught with narcotics clutched to their breast are afforded the right to contest the legality of the means by which the evidence was obtained, but others, either marginally involved or not involved at all, are not allowed to hold police officers to constitutional requirements because their rights have not been violated. Furthermore, the evidence can be introduced to convict them either substantively or on an aiding and abetting notion or even a conspiracy theory—where the charges are difficult enough to combat given the fact that they frequently do not know the parties directly involved or the location of the contraband or enough facts to realistically counter the charges. Consequently, only the most culpable and knowledgeable can meaningfully contest the illegal search and seizure, while the least involved and least knowledgeable cannot. What particle of jurisprudential wisdom supports this tenet?

Secondly, the aforesaid treatment breeds disrespect for the law. How does a defense counsel explain to his client that the person caught with the contraband at his home or in his vehicle goes free because of police misconduct and, yet, he must stand trial and suffer conviction—as in this case—because he knows nothing about the location of the parties or the contraband? It is true that often one must have a legal background to understand legal protections and their subtleties, but the present standing rules

can find no comfort in such an observation.

Finally, if the police know that the worst penalty they suffer from a blatant illegal search and seizure is that the case against the person sitting on the contraband is lost but the case against those whom they believe to be involved is left intact, illegal searches and seizures are hardly discouraged. To the contrary, they are encouraged!

The present "standing" rules are anachronistic, shameful, unjust and, as stated, breed contempt for the law. That is reason enough to overturn them and endorse the rule–well thought out and enunciated in California–that the government may not claim that the evidence it seeks to introduce against a defendant not only incriminates him and licenses his conviction but, at the same time, maintain that he cannot protest the illegality of its acquisition because he is not *prima facie* guilty enough to do so; or that the illegal search and seizure of another, his car, or his residence, is unobjectionable if the evidence is only used against the lesser lights in the criminal activity.

The question we will next address is: How did the law manage to entwine itself into such an absurdity? This counsel believes that it is due to a series of historical accidents where the law developed on different interrelated fronts and the interrelationship was not vivid during either the embryonic or developmental stages, but only at the conclusion of the developmental process. Perhaps this can be illustrated! On the one hand, in a simplistic, largely rural United States–with a heavy emphasis on the common law and a Constitution and Bill of Rights adopted when this country was new, experimental, and not yet urbanized nor so technological–those institutions as a matter of course were reflected in the various sources of law. "A man's home [was] his castle" in 17th Century

England, and still is, but now we recognize that we have automobiles in the 20th Century (*see, e.g., United States v. Chadwick* (1977), 433 U.S. 1), plus telephone booths (*cf. Katz v. United States* (1967), 389 U.S. 347), and home and car telephones and public toilets galore (*see, Britt v. Superior Court* (1962), 58 Cal. 2d 469), and urban proximity, so that we have witnessed the search and seizure protection necessarily and justifiably extended from homes to cars to phone booths to toilet stalls and to any place wherein a person has exhibited a reasonable expectation of privacy. Even trash barrels! *People v. Krivda* (1971), 5 Cal. 3d 357; *People v. Edwards* (1969), 71 Cal. 2d 1096. Contrary to the antiquated notion that items placed in the trash were presumed to be open to the inspection of all eyes, including the police, we now recognize that the discarding of materials into a trash can in no way indicates that the homeowner wishes that anyone, much less the police, pry into the most intimate secrets of his private life; but, rather, that it is the functional equivalent of tearing up letters or setting fire to them in the confines of one's own home (*ibid*). So the first conclusion we must acknowledge is that with urbanization, modernization and technological advance, the area of both privacy and habitat has justifiably been altered from yesteryear.

While the first development in the search and seizure laws was functionally necessary and provident, a fatal flaw was injected into them, and has been perpetuated to this day. That flaw is the artificial separation between the rights of people to be protected in their privacy interests, irrespective of place, and the right to assert that privacy interest–in other words, guarantee its protection against violation. Given the original notion of property rights and

the necessity that illegal searches and seizures violate the "niceties of trespass law" (*see, e.g., Goldman v. United States*, 316 U.S. 129), persons who did not have a greater interest than mere lawful presence to share someone else's privacy were evicted from the class of those who could legally complain about police violations. This, frankly, was a mistake from the outset, but, while some other facile notions about search and seizure protection have been corrected, this one has stood still and in some respects has actually lost ground (*cf. Rakas v. Illinois* (1978), 439 U.S. 128, and *United States v. Salducci* (1980), 448 U.S. 83, *with, Jones v. United States* (1960), 362 U.S. 257). Because the more the law has legitimately focused on the privacy rights of individuals, no matter where they may be, but not taken cognizance of the fact that persons' privacy interests are now more mobile and versatile, or collective privacy interests of a number of people now frequently occur because of the changes in society enumerated above, keeping the standing rules comparatively rigid has resulted in protecting those whose rights are most conspicuously violated but ruling off-limits the challenge of those who predictably stand to go to jail as a result of the invasion of privacy. Those who are not owners but mere passengers in cars or who do not have sufficient connection with the geographic or privacy contours of the primary offended party, even if they are a "target," nevertheless can be arrested and convicted because of police misconduct and, by virtue of their remoteness, are less able to effectively ward off the charges against them or complain about constitutional infringement. This is the travesty.

As a result of the above incongruity, we now bear witness to a policy which continues to separate "standing" from sub-

stantive rights and leads to the abuses outlined above and which occurred in this case.

Standing should never have been viewed as separate from the exclusionary rule in enforcing the Fourth Amendment. It is part and parcel of it. Police officers should be able to use illegally obtained evidence against a party in court if, and only if, we are secure in our appraisal that they will not be encouraged to conduct illegal searches and seizures by the standing rules; that is, that the illegality is geographically, spatially and functionally sufficiently removed so as to "dissipate the taint"; and, secondly, the implementation of constitutional guarantees should not so blatantly protect the guilty and free the marginally involved or innocent. The notion that standing should be viewed as separate and apart from the substantive protection and the interests to be protected and the jurisprudential equities to be espoused was shallow in its inception and is presently indefensible in its perpetuation. Consequently, we urge an overhaul and an enlightened opinion realistically grappling with those oversights of serious dimension.

## II

## Petitioner FRANCO's Motion For Severance Of His Trial From Those Of The Other Defendants Should Have Been Granted, And, By Not Doing So, The Trial Court Violated Petitioner's Rights Under The Sixth Amendment To The United States Constitution.

A severance motion was filed by attorney for codefendant TRUJILLO-GARCIA well in advance of trial, and was joined in by the other defendants, which motion persisted

unruled upon not only prior to trial but during trial [RT 485, 503-504] and, unbelievably, until the trial had concluded with a pronouncement of the petitioner's guilt [RT 545]. Prior to trial the prosecution conceded, *inter alia*, that it would introduce statements from the mouth of codefendant ESTRADA which would severely incriminate petitioner FRANCO; to wit, ESTRADA would relate that he obtained the cocaine from FRANCO and would also relate the circumstances of the occurrence. [ECR 1-3; RT 141]. Clearly, such incriminating statements from a codefendant required that either a severance be granted, the statements not be used at all, or a meaningful redaction be employed. In fact, that is the precise series of options which the prosecutor proposed choosing from. [ECR 9]. By not doing so, petitioner FRANCO suffered a grave infringement of his right to confront and cross-examine all witnesses against him under the Sixth Amendment to the United States Constitution. *Pointer v. Texas* (1965), 380 U.S. 400.

The severance motion was never ruled upon until after petitioner Franco was found guilty. The trial proceeded and the evidence and testimony was adduced without any ruling on the motion for severance.[3] Moreover, the incriminating statements were introduced unredacted and incriminated FRANCO, who was convicted without the codefendant ESTRADA having to budge from his chair, neither testifying nor being called as a witness. This violated FRANCO's Sixth Amendment rights. *Bruton v. United States* (1968), 391 U.S. 123.

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[3] After petitioner FRANCO was convicted, the trial court commented, "I guess I have granted a severance." [RT 543].

The motion for severance should have been ruled upon in advance of trial and granted; or, in the event of a joint trial, the statements should not have been utilized unless they were redacted so as not to point the finger of suspicion at petitioner FRANCO. This was not done, and, consequently, petitioner FRANCO is entitled to a new trial.

III

**The Codefendant HORACIO RAUL ESTRADA Sat At The Defense Counsel Table And Conferred Extensively With His Codefendants And Their Attorneys, Thus Placing Himself In The Heart Of The Defense Camp During The Trial While, Unbeknownst To The Defense, He Was A Government Agent. This Indisputably Denied Petitioner FRANCO His Right To Effective Counsel And A Fair Trial As Guaranteed To Him Under The Sixth Amendment To The United States Constitution And Violated The Attorney-Client Privilege.**

Although there were five defendants indicted in this case, only four went to trial since JORGE AYAD-BAYONA pled guilty and did not appear at trial. One codefendant, HORACIO RAUL ESTRADA, was intent on pleading guilty but remained as a serious defendant throughout the proceeding. The record supports the contention that he was comprehensively a part of the defense planning sessions and strategy [RT 43, 45, 82]. The unknown fact which emerged during the trial was that he was simultaneously a defendant and a government informant. Thus, the government had the luxury of a witness posing as a codefendant quartered in the defense camp. In fact, on at least one occasion, he was represented by co-counsel

while his attorney was occupied elsewhere [RT 182].

HORACIO RAUL ESTRADA, unbeknownst to the defense, had been working as a confidential informant for the D.E.A. (the investigative agency in this case) for the previous four or five years [RT 413, 418, 419, 629-671].

Subsequent to petitioner FRANCO being found guilty, counsel learned the following:

1. ESTRADA had been an informant originating with the Los Angeles Police Department in 1972 [RT 633-634].

2. Agent Gorman, one of the chief investigating agents for the D.E.A. in the present case, had–previous to the criminal conduct here–paid ESTRADA $1,000 or $2,000 to obtain a home. They were close personal friends–like penitent and priest–and ESTRADA confided in Agent Gorman, frequently going to him for help in solving problems [RT 633-671].

3. ESTRADA introduced petitioner FRANCO to his contacts so he could appear to be removed from dealing narcotics and talked him into dealing with a view to finding out his sources and reporting that information to D.E.A. Agent Gorman (*ibid*).

How could the defense have had the fair trial with the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution with ESTRADA sitting at the defense table in a cozy position and privy to every exchange of confidential information by the defense? We strenuously urge that petitioner FRANCO was denied his Sixth Amendment rights by this conduct.

It has been held that the accused is denied the effective assistance of counsel if the government, through one of its agents, inspects the confidential papers of the defendants or intercepts telephonic conversations between them. *Caldwell*

*v. United States*, 205 F.2d 879, 881 (App. D.C. 1953); *Coplon v. United States*, 191 F.2d 749, 759-760 (App. D.C. 1951). In this case, the transgression was far more grave. The government agent listened not to just bits and pieces of information but was privy to the actual trial and deliberations of the defense during the trial. Such conduct should not be condoned or tolerated. This case should have been reversed and dismissed, and a writ is requested to review the judgment of the Ninth Circuit Court of Appeals.

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

LUKE McKISSACK

*Attorney for Petitioner*

## APPENDIX "A"

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## OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 81-1349

UNITED STATES OF AMERICA, Appellee, vs. JESUS ANTONIO TRUJILLO-GARCIA, Appellant.

No. 81-1447

UNITED STATES OF AMERICA, Appellee, vs. HORACIO RAUL ESTRADA-ELIAS, Appellant.

No. 81-1685

UNITED STATES OF AMERICA, Appellee, vs. MIGUEL FRANCO-GOMEZ, Appellant.

DC No. CR 80-726

Appeal from the United States District Court for the Southern District of California, Earl B. Gilliam, District Judge, Presiding.

Argued and submitted July 9, 1982.

BEFORE: GOODWIN, NELSON, Circuit Judges, and SMITH,* District Judge

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*Honorable Russell Evans Smith, United States District Judge for the District of Montana, sitting by designation.

[FILED AUGUST 16, 1982]

Estrada-Elias appeals his sentence after a plea of guilty to possession of cocaine with intent to distribute. Franco-Gomez appeals his conviction by the court of conspiracy to distribute cocaine and three counts of possession with intent to distribute cocaine. Trujillo-Garcia appeals his conviction by the court of conspiracy to distribute cocaine and possession with intent to distribute cocaine and heroin.

We affirm the convictions of Estrada-Elias and Franco-Gomez. We reverse the confiction of Trujillo-Garcia because the evidence against him was obtained in a search and seizure which violated his Fourth Amendment rights.

## FACTS

A DEA confidential informant contacted Estrada-Elias to buy cocaine. Estrada-Elias was himself a former DEA informant. On October 3, 1980, in the presence of the informant, Estrada-Elias received a delivery of approximately one pound of cocaine from Franco-Gomez at Estrada-Elias' place of business. (Franco-Gomez was followed and subsequently arrested on the freeway; his car contained approximately 1 and ½ kilos of cocaine.)

Followed by DEA agents, Estrada-Elias took the pound of cocaine in a brown paper bag to an apartment rented by Trujillo-Garcia and Aguirre, another codefendant who was acquitted. Estrada-Elias remained inside the apartment for a few minutes, was seen holding a smaller package and talking briefly with Trujillo-Garcia in the doorway, and then proceeded to a rendezvous with the informant a few blocks away, where he was arrested by Agent Gorman

after he had sold an ounce of cocaine.

At approximately the same time, federal agents entered the Trujillo-Garcia/Aguirre apartment without a warrant and made a sweep through its rooms. They observed a quantity of cocaine in a bowl in Aguirre's bedroom. With this and other information, the agents obtained a search warrant several hours later which resulted in the seizure of approximately ½ kilo of cocaine, 4 ounces of heroin, and "drug paraphernalia" (scales, blender, etc.). The only evidence found in Trujillo-Garcia's bedroom was a residue of cocaine in the closet.

After Estrada-Elias was arrested, he told Agent Gorman that he had delivered a pound of cocaine to Trujillo-Garcia and that customers were coming to look at it. The parties dispute whether these statements were known tb the agents who made the warrantless entry of Trujillo-Garcia's apartment.

Franco-Gomez stated that he and Estrada-Elias were partners, and that at the time of his arrest he was on his way to a meeting with Estrada-Elias to deliver the rest of the cocaine.

## ESTRADA-ELIAS' ISSUES

After several days of a court trial, Estrada-Elias pled guilty to possession with intent to distribute. He had been previously convicted of a federal narcotics offense. After a sentencing hearing lasting several days, he was sentenced to ten years with a special parole term of six years. (This sentence is well within the maximum sentence under the statute.)

He now asserts that the trial court erred in considering hearsay supplied by a police officer concerning drug dealings in San Jose that were unconnected with the transactions

in issue in this case. Inasmuch as the sentencing judge announced that he was paying no attention to this information, there is no ground for objection to the information coming to the court's attention.

Estrada-Elias makes another argument that he was denied the effective assistance of counsel because his attorney failed to present a defense of entrapment. Estrada-Elias contends that he became involved in the criminal activities to which he ultimately pled guilty only because he was trying to protect himself and his family from the consequences of his former activities as a DEA informant.

There was no evidence of entrapment sufficient to require reasonably competent counsel to assert it as a defense. Any such argument was appropriate only as a plea for leniency in sentencing, and it was presented as such. Estrada-Elias has failed to make a showing that he did not receive reasonably competent and effective representation. *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) *cert. denied*, 440 U.S. 974 (1979).

## FRANCO-GOMEZ'S ISSUE

Franco-Gomez argues that he moved for severance before trial, but his motion was not ruled on until after trial. He contends that his right to cross-examination was infringed by the introduction of statements by co-defendant Estrada-Elias which incriminated him.

The government points out that the hearing in this case was a combined motion hearing and court trial, and that the court specifically refused to admit any hearsay statements by Estrada-Elias against the other defendants.

The court stated upon finding Franco-Gomez guilty, "I guess I have granted a severance." There was neither error nor prejudice in this regard.

Franco-Gomez also argues that there was no evidence that he knew Trujillo-Garcia or had been to his apartment, and that he could not be convicted of aiding and abetting Trujillo-Garcia's possession with intent to distribute. He contends that there was no showing that the cocaine found in the dish in the apartment had any connection with him, and that he had already been convicted of conspiracy with regard to that substance.

In reviewing the sufficiency of the evidence, this court must view the evidence in the light most favorable to the government and draw all reasonable inferences supporting the conviction; the verdict must be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). In this case, the stipulation signed by Franco-Gomez and the observations of the agents clearly link him to the cocaine found in the bedroom of the Trujillo-Garcia apartment. It is not necessary that an aider-abetter know all the details of the crime or all the persons perpetrating the crime. *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982). There was sufficient evidence to support the verdict.

Franco-Gomez also argues that he was denied the effective assistance of counsel because a codefendant, Estrada-Elias, was a government informant during trial at the same time that he was a part of the defense team. However, he fails to support this conclusory allegation with any proof that Estrada-Elias was acting as an informant at the time of the sale of cocaine or at the time of trial, and the record indicates otherwise. Moreover, the issue was not

raised at trial, in spite of counsel's knowledge of Estrada-Elias' previous status as a DEA informant.

We affirm Franco-Gomez's conviction.[1]

## TRUJILLO-GARCIA'S ISSUES

Agents entered and "secured" Trujillo-Garcia's apartment without a warrant at 3:10 p.m. A search warrant was obtained more than four hours later.

We note that the Supreme Court has recently re-emphasized the transcendent privacy interest in private residences. *Payton v. New York*, 445 U.S. 573 (1980). We start with the premise that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347 (1967). The government here relies on the "exigent circumstances" exception. *See McDonald v. United States*, 335 U.S. 451 (1948). When police officers, acting on probable cause and in good faith, reasonably believe from the totality of the circumstances that (a) evidence or contraband will be destroyed or (b) the nature of the crime or character of the suspect(s) pose a risk of danger to the arresting officer(s) or third persons, we have held that exigent cir-

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[1] Franco-Gomez also attempts to challenge the search of Trujillo-Garcia's apartment. He concedes that on the facts of this case he lacks a legitimate expectation of privacy in Trujillo-Garcia's apartment under federal law. Because we are bound by the decisions of the Supreme Court, we do not address his arguments as to the correctness of those decisions.

cumstances justify a warrantless entry, search or seizure of the premises. *United States v. Kunkler*, No. 80-1710 (9th Cir. June 8, 1982); *United States v. Gardner*, 627 F.2d 906, 910-12 (9th Cir. 1980); *United States v. Fulton*, 549 F.2d 1325, 1327 (9th Cir. 1977); *United States v. McLaughlin*, 525 F.2d 517, 520-21 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976); *United States v. Curzi*, 498 F.2d 30, 35-36 (9th Cir. 1974).

The burden is on the government to show the existence of exigent circumstances by a preponderance of the evidence. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970), and *United States v. Matlock*, 415 U.S. 164, 177-78, n. 14 (1974). Because the government failed to meet its burden in this case, we reverse.[2]

A warrantless entry cannot be justified solely because the agents knew or suspected that there was contraband on the premises. *United States v. Allard*, 600 F.2d 1301, 1303-4 (9th Cir. 1979). The agents who effected the warrantless entry testified that they did so to continue the investigation, to ensure the safety of themselves and bystanders, and to preserve evidence. The government argues that Trujillo-Garcia might somehow have learned of the arrests of Franco-Gomez and Estrada-Elias and proceeded to destroy the cocaine. However, the government fails to provide any evidence to support this speculation. *See United States v. Allard*, 600 F.2d at 1304, (officers had no facts upon which to base a reasonable belief that the occupant knew of his accomplice's arrest or had been instructed to destroy the

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[2] In reviewing the trial court's ruling on the motion to suppress, we defer to the trial court's findings of historical fact, but we must make an independent determination whether constitutional requirements have been met. *Ker v. California*, 374 U.S. 23, 34 (1963).

contraband).

The government also argues that Estrada-Elias' statements after arrest provided a reasonable basis for concern that customers might arrive or that Estrada-Elias' failure to reappear might alert Trujillo-Garcia and cause him to destroy the cocaine. However, the government failed to show that Estrada-Elias' statements were made before the warrantless entry or that they were known to the agents who made the entry (or to their superior who ordered it). The government contends that knowledge of Estrada-Elias' statements should be imputed to the agents who entered Trujillo-Garcia's apartment because they were working as a team with the agents who arrested Estrada-Elias. The district court apparently agreed with this interpretation of *United States v. Bernard*, 623 F.2d 551 (9th Cir. 1979), which held that for purposes of determining probable cause to arrest, the arresting agent could rely on the opinions of other agents in addition to his personal knowledge. In *Bernard*, however, the other agent's opinion was actually communicated to the agent who authorized the arrest. In the case at bar, the government failed to show such a communication between the agent who arrested Estrada-Elias and the agents who entered Trujillo-Garcia's apartment without a warrant.

There was no evidence that Trujillo-Garcia was armed or dangerous. No one had entered or left the apartment before the agents entered. *Cf. United States v. Curran*, 498 F.2d 30, and *United States v. McLaughlin*, 525 F.2d 517. There was no immediate threat that Franco-Gomez or Estrada-Elias would be able to telephone Trujillo-Garcia. *Cf. United States v. Flickinger*, 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978).

The circumstances were not sufficiently exigent to

justify a warrantless entry in this case. The evidence should have been suppressed.[3] Because we cannot say that the admission of the evidence was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18 (1967), we reverse the conviction of Trujillo-Garcia.[4]

The judgments against Estrada-Elias and Franco-Gomez are affirmed. The judgment against Trujillo-Garcia is reversed.

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[3]The subsequent issuance of a search warrant does not purge the taint under *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980).

[4]Because we reverse on this ground, we do not reach the question of the sufficiency of the evidence to sustain Trujillo-Garcia's conviction.

# PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
County of Riverside )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the State of California, County of Riverside, employed in the County of Riverside, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on OCTOBER 13, 1982, I served the within PETITION FOR WRIT OF CERTIORARI (Miguel Franco-Gomez v. United States of America) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
FOR THE SOUTHER DISTRICT OF CALIFORNIA
940 Front Street
San Diego, California 92189

And, further, that I served the UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT a copy thereof at:

POST OFFICE BOX 547
SAN FRANCISCO, CALIFORNIA 94101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 13, 1982, at CORONA, CALIFORNIA.

_____

D. A. Standefer

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